SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted]32

CHRISTIAN F. BRÆEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT, PFEIFER OIL TRANSPORTATION COMPANY, INC., IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS.

	PAGE
STATEMENT	1
THE QUESTIONS PRESENTED	3
REASONS FOR DENYING THE WRIT	4
CONCLUSION	6

TABLE OF CASES.

Butler v. *Whiteman*, 356 U. S. 271	5
Cone v. *West Virginia Pulp & P. Co.*, 330 U. S. 212	4
Desper v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190	6
Fountain v. *Filson*, 336 U. S. 681	4
Grimes v. *Raymond Concrete Pile Co.*, 356 U. S. 252	5
Globe Liquor Co. v. *San Roman*, 332 U. S. 571	4
Johnson v. *New York, New Haven & Hartford R. Co.*, 344 U. S. 48	4
Nogueira v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137	6
Norton v. *Warner Co.*, 321 U. S. 565	6
Pennsylvania R. Co. v. *O'Rourke*, 344 U. S. 334, 340	6
Senko v. *LaCrosse Dredging Corp.*, 352 U. S. 370	5, 6
South Chicago Coal & Dock Co. v. *Bassett*, 309 U. S. 251, 257	6
Swanson v. *Marra Bros.*, 328 U. S. 1	3, 6

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Statement.

This is an action brought by the plaintiff to recover for personal injuries sustained by him on January 22, 1953, while attempting to proceed from a work barge permanently withdrawn from navigation called the *Winnisook* to a raft tied alongside thereof in order to affix deck planking upon the said raft. The plaintiff had been employed by the defendant as a mate on its barge *Pfeifer No. 2*. On the day prior to his injury, that barge had come to defendant's repair yard at West Brighton, Staten Island, for repairs to a cargo pump. On the morning of the accident, plaintiff had worked aboard that barge for about an hour in dismantling the cargo pump. He was then ordered by defendant's Vice President in charge of repair work at the yard

to perform the carpentry work of completing the laying of the deck on the aforesaid raft. The reason therefor was that there were sufficient persons engaged in performing the repair of the pump on the *Pfeifer No. 2* and there was no occasion for the plaintiff to work aboard the vessel at that time. The work upon the raft had nothing whatever to do with the work which was being performed upon the *Pfeifer No. 2.* There was no issue of fact thereon. The plaintiff's testimony on the point is quoted in the decision of the Court of Appeals as Footnote 1 at page 16 of the appendix to the petition.

Although plaintiff's injury did not occur on board or in connection with the performance of any work upon or relating to the *Pfeifer No. 2* upon which he had been employed as a seaman, but arose out of and was related to work unconnected with that barge and having nothing whatever to do with a seaman's activities as a member of a crew of a vessel, plaintiff sought to maintain action under the Jones Act.

Motions had been made at the close of the plaintiff's case for dismissal of the complaint, at the close of the whole case for a directed verdict, and, after a verdict had been returned in favor of the plaintiff, for judgment n.o.v. Decision on the motion to dismiss at the close of plaintiff's case was reserved, and the motions for a directed verdict at the close of the entire case and for judgment n.o.v. were denied.

Upon appeal the majority of the Court below held that there was no evidence upon which the case could properly have been submitted to a jury for verdict under the Jones Act. The Court further unanimously held that even if there had been a jury question, the case was submitted to the jury under an inadequate and improper charge and that the District Court had erred in failing to charge the jury as

requested by the defendant (Petitioner's Appendix, pp. 18-21).

Contrary to the statements made by petitioner in his Statement Of The Case and in his Statement of Facts, the decision of this case did not turn, and was never urged to turn, upon any question of discharge of plaintiff from his employment aboard the *Pfeifer No. 2;* nor was there the slightest suggestion in the evidence as insinuated, though not stated, by petitioner (pp. 11-12 of Petition) that plaintiff at the time of his injury was using the barge *Winnisook* as a means of access from or ingress to the barge *Pfeifer No. 2.*

The Questions Presented.

The questions presented as stated in the petition do not present questions for review on petition for writ of certiorari under Rule 19 of this Court.

It can add nothing to the validity of the petition that a jury verdict was rendered in favor of the plaintiff, since it was rendered under an inadequate and insufficient and erroneous charge which failed to give the jury any basis whatever for a determination as to whether or not at the time of his injuries, the plaintiff was engaged in work as a member of a crew of a vessel and whether his injury arose out of his employment as a seaman as such engaged in the service of his ship (Petitioner's Appendix, pp. 19-20).

All that is presented in this case is whether or not under plaintiff's own proof, which is so conclusive (see Footnote 1, Petitioner's Appendix, pp. 16-17), plaintiff could, under any conceivable interpretation of the Jones Act, as limited by the Longshoremen's and Harbor Workers' Compensation Act (*Swanson* v. *Marra Bros.*, 328 U. S. 1), be entitled to a Jones Act remedy. By this petition this Court is being

requested to review the entire record in this case to ascertain whether it would, contrary to the judgment of the majority of the Court of Appeals, come to a different conclusion as to whether facts had been presented upon the trial from which a contrary inference could be drawn to that stated by the Court of Appeals.

There can be no question, and none has been raised, that the Court of Appeals was acting within its appropriate powers in granting judgment dismissing the complaint where a motion for judgment n.o.v. had been made in the trial Court. *Cone* v. *West Virginia Pulp & P. Co.*, 330 U. S. 212, *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, *Fountain* v. *Filson*, 336 U. S. 681 and *Johnson* v. *New York, New Haven & Hartford R. Co.*, 344 U. S. 48.

Reasons for Denying the Writ.

This petition, it is respectfully submitted, satisfies none of the criteria for review on writ of certiorari set forth in Rule 19 of the Rules of this Court.

There is set forth no showing that the writ presents any special and important questions for settlement by this Court. At most it presents a question of consequence only to the litigants in this case. Because of the very limited and narrow factual pattern involved, the case can have no possible general or important application in the field of law pertinent.

(1) There is no showing that the decision of the Court of Appeals is in conflict with the decision of another Circuit on the same matter.

(2) There is no showing nor even a suggestion that the Court of Appeals has decided an important question of Federal law which has not previously but should be settled by this Court.

(3) There is no showing that the Court of Appeals has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower Court.

(4) The only suggestion in the petition that the Court of Appeals decision is in conflict with the decisions of this Court, is the statement that since the plaintiff's duties as a seaman on board the *Pfeifer No. 2* had included making minor repairs to that barge, and the work which he was doing when he was injured involved the making of minor repairs, not to the barge *Pfeifer No. 2*, but to a raft, a question was presented under the decisions of this Court in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252 and *Butler* v. *Whiteman*, 356 U. S. 271, as to whether plaintiff's injuries arose out of the performance of work as a seaman and a member of the crew of the *Pfeifer No. 2* (Petition, pp. 9-10); the contention being that under these cases "the duties of a man during the vessel travelling are relevant in determining whether he is a member of a crew while the vessel is anchored" (Petition, p. 9). The suggested conflict with these decisions is tenuous and strained; for here the plaintiff was not even working upon or in connection with his vessel, but was doing work entirely unrelated to the vessel upon which he had been engaged as a seaman, and the kind of repairs he was performing were not comprehended within the type of repairs which he had testified it was part of his duty to perform upon the vessel upon which he had been employed as a seaman.

There is no contrariness in principle indicated—and there is none—between the present decision and any of the cases cited by petitioner at pages 10 and 12 of the petition. The difference in result follows from the difference in the fact situation presented.

The Court of Appeals as authority for its decision dismissing the complaint in the present case, has relied upon the decisions of this Court in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 137, *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 340, *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 371 (Footnote 2, p. 17, Petitioner's Appendix), *Swanson* v. *Marra Bros.*, 328 U. S. 1, (p. 17, Petitioner's Appendix) and *Norton* v. *Warner Co.*, 321 U. S. 565 (Footnote 3, p. 18, Petitioner's Appendix), as well also as upon the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 257 (p. 18, Petitioner's Appendix).

There is no suggestion in the petition that the Court of Appeals misinterpreted, misunderstood or misapplied the rules enunciated by this Court in those cases. Indeed, the petition here, except for the formal requirements of Rule 23, is but a repetition of the arguments made in the Court of Appeals upon which petitioner failed to prevail, and is in the nature of an appeal, as if this Court were a Court of Errors,and Appeals in the same sense as the highest State Courts.

Conclusion.

For the reasons above stated, the petition for writ of certiorari should be denied.

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